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In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM ANTONIO QUINONES AND CANDIDA FIGUEROA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A25-A30) is reported at 613 F. 2d 47.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31-A32) was entered on January 17, 1980. A petition for rehearing was denied on February 11, 1980 (Pet. App. A33-A34). The petition for a writ of certiorari was filed on February 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in refusing to permit petitioners to be represented by the same attorney after it found a substantial possibility of conflicting defenses that petitioners did not fully understand.

STATEMENT

On May 31, 1979, petitioners were indicted, along with ten other defendants, in a 12-count indictment charging a conspiracy to engage in the unlawful traffic of heroin, in violation of 21 U.S.C. 841(a)(1), 843(b) and 952(a), and related substantive offenses. Both petitioners were named in count 1, the conspiracy count. Petitioner Quinones was also named in count 10, which charged him and two others with possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Figueroa was not named in any other count.

The conspiracy count charges, *inter alia*, that Ismael Pagan Quinones (petitioner Quinones' brother) organized several individuals for the purpose of accepting a supply of heroin in Chicago that had been smuggled into the United States from Mexico and delivering the heroin for sale in Philadelphia. As one overt act, the indictment alleges that from December 1976 to February 1977, petitioners traveled to Philadelphia from Chicago. Paragraph 4(h) of the indictment alleges, in part, that in order to further the objects of the conspiracy, petitioner Quinones directed and supervised petitioner Figueroa in accepting requests for purchases of heroin, in arranging deliveries of heroin, and in accepting payment for the "goods" and making deliveries. In addition, paragraph 4(g) of the indictment alleges that petitioner Quinones was assigned by his brother to supervise the Quinones organization in the latter's absence.

On August 27, 1979, upon learning that petitioners intended to be jointly represented by the same counsel, the government requested a pretrial hearing to determine if joint representation would jeopardize petitioners' Sixth

Amendment right to the effective assistance of counsel, and if so, whether petitioners were capable of a knowing and intelligent waiver of that right.

A hearing was held on this motion on September 4 and 5, 1979. At the first day's proceedings, defense counsel, Charles Burr, informed the court that he had discussed with petitioners that morning the possibility of a conflict of interest and that petitioners had informed him that their defenses did not conflict. Counsel also informed the court that petitioners were prepared to waive their Sixth Amendment rights even if there were some possibility that a conflict of interest would develop (1 H. 13-15).[1] Defense counsel agreed with the court's observation that, on the face of the indictment, the situation was "pregnant with potential conflict" because of the allegation that Quinones had supervised Figueroa's activities, but counsel informed the court that petitioners had assured him that the charges were not true (1 H. 15-16).

The court then questioned petitioners in order to determine their ability to appreciate the risks inherent in joint representation. In particular, he questioned them concerning their understanding of the charges brought against each of them, their understanding of what constituted a conflict of interest, and the various ways in which such a conflict could develop (1 H. 23-28, 32-36). Certain of petitioners' responses seemed to indicate that

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[1] "1 H." refers to the transcript of that portion of the hearing held on September 4, 1979; "2 H." refers to the transcript of that portion held on September 5, 1979. Most of the transcript of the September 5 hearing is reprinted in the appendix to the petition for a writ of certiorari, at A1-A21.

they did not fully comprehend the scope of the problem.[2] Believing that a part of the problem might be in petitioners' inability to express themselves fluently in English, the court adjourned the hearing until the following day, when an interpreter could be present (1 H. 37-38).

The following day, the court continued its questioning of petitioners with an interpreter's assistance. Again petitioners' responses to the court's questions failed to satisfy the court that petitioners fully grasped the risks attendant on joint representation (2 H. 15; Pet. App. A10).[3] Petitioners nonetheless insisted that their defenses did not conflict, but that even if a conflict developed, they

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[2]For instance, in response to the court's query whether he saw any possible conflict of interest in paragraph 4(h) of the indictment, which charged him with directing and supervising Figueroa in the alleged heroin transactions, Quinones replied (1 H. 33) that he saw no possible conflict of interest. Figueroa, when presented by the court with a hypothetical situation in which her defense might differ from that of Quinones, replied (1 H. 35): "Well, I understand what you mean, but I don't see no possibility of conflict of interest because I want him to be my lawyer."

[3]When the court asked Quinones to describe the charges against Figueroa, Quinones incorrectly replied that the indictment charged Figueroa with conspiracy "to distribute and to supervise and arrange" deliveries of heroin (2 H. 7; Pet. App. A4). The court then presented Quinones with a hypothetical situation in which his defense might conflict with that of Figueroa. Quinones stated that he could see in that situation the possibility of a conflict of interest, but that he would "leave that in the hands of the attorney for him to decide" (2 H. 11; Pet. App. A7; see also 2 H. 14; Pet. App. A9). The court then asked Figueroa what she would want counsel to do in the event she decided to change her plea to guilty under circumstances that would require her to testify against Quinones and the other defendants. Figueroa replied (2 H. 15; Pet. App. A10): "I think I'm not sure that Mr. Burr has the skills and the honesty and he would be willing to provide the same type of defense for both of us."

still wanted Burr to represent them (2 H. 7-15; Pet. App. A4-A10). In addition, Burr presented the court with a letter dated August 23, 1979 from petitioners to Burr (Pet. App. A22), which stated that they were aware of the possibility of a conflict that might require Burr to sacrifice the interests of one for the sake of the other; that they had discussed the facts of the case with Burr and were satisfied that their interests were identical; and that they recognized they had a right to separate counsel but wanted Burr to represent them both (2 H. 16-18; Pet. App. A10-A12). Finally, in response to questioning by Burr, petitioners stated that they understood their Sixth Amendment right to the effective assistance of counsel, that they wanted Burr to represent them "even though [he] might be confronted with the same types of situations" the court had explained, and that they realized they might be losing their right to raise the issue of effective assistance of counsel on appeal if they waived that right at the pretrial hearing (2 H. 19-20; Pet. App. A13-A14).

The court refused to find that petitioners had knowingly and intelligently waived their right to the effective assistance of counsel. The court concluded (2 H. 37) that given the circumstances, including the language problem, it could not "conclude that [petitioners had] that detailed and systematic comprehension and apprehension of the way the record [might] develop and what conflicting tactics [might] emerge" necessary to constitute a waiver. The court accordingly ordered Burr to discontinue his representation of one of the petitioners (2 H. 40, 42-43; Pet. App. A20-A21, A23-A24).

ARGUMENT

Petitioners contend (Pet. 5-12) that the decision of the court below implicitly establishes a per se rule that disqualifies counsel under all circumstances from representing more than one defendant in a criminal case, even when the defendants have expressed willingness to relinquish their right to conflict-free representation. We believe that there would be much to command such a per se rule, at least where there is a real possibility that the lawyer would labor under a conflict of interest.[4] That

[4]Petitioners appear to argue (Pet. 6) that they have a constitutional right to be represented by the same attorney even if joint representation would concededly give rise to a conflict of interest for the attorney. We disagree. A defendant has a Sixth Amendment right to forgo the assistance of counsel altogether and to represent himself in criminal proceedings. *Faretta* v. *California*, 422 U.S. 806 (1975). But it does not follow that a defendant who chooses to be represented by counsel has the constitutional right to "counsel of his choice" where the court finds that counsel would be burdened with a conflict of interest.

In our view, the Court's decision in *Faretta* is not premised on a Sixth Amendment right to waive the assistance of counsel, from which the right petitioners assert to waive the *effective* assistance of counsel might be implied. Rather, the right to appear personally is an independent right founded in the Sixth Amendment, which generally confers on the defendant the right to make his own defense. 422 U.S. at 819; see *United States* v. *Dolan*, 570 F. 2d 1177, 1183 (3d Cir. 1978). One of the means available to the defendant in making his defense is to invoke the assistance of counsel. When a defendant chooses to be represented by counsel, however, he necessarily accepts reasonable limitations on the availability, qualifications, and conduct of counsel, including ethical standards necessary to preserve the fairness and integrity of the administration of justice and the appearance of such fairness and integrity. Thus, although courts should not lightly interfere with a defendant's selection of a lawyer to represent him, there is a strong, countervailing public interest in ensuring that attorneys who appear as officers of the court and participate in the administration of the criminal justice system are not

issue is not raised in the present case, however, because the court of appeals did not purport to rule that multiple defendants can never be represented by the same counsel whenever the lawyer may have a conflict of interest; rather, it simply held that on the facts of this case the district court did not commit clear error in finding that petitioners had not made a knowing and intelligent waiver

burdened with conflicting loyalties to the clients they represent. Cf. *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652, 658 (4th Cir. 1977).

In this connection, the American Bar Association, in its *Standards Relating to the Administration of Criminal Justice, The Defense Function* (1974), cautions that a lawyer "should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another." § 3.5(b), at 123, quoted in *Holloway* v. *Arkansas*, 435 U.S. 475, 486 n.8 (1978). The *Standards* regard the potential for a conflict in multiple representation to be "so grave" that the lawyer should decline such representation except in unusual circumstances when, "after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation." *Ibid.* See also *ABA Code of Professional Responsibility* DR 5-105 (1978). In the present case, as the district court found, it is not "clear that no conflict is likely to develop."

Thus, we believe the district court in the present case could properly have declined to allow Burr to represent both petitioners even if it concluded that their waivers were knowing and intelligent. But see, *e.g.*, *United States* v. *Garcia*, 517 F. 2d 272, 276-277 (5th Cir. 1975). There is no need to reach that issue here, however, because the district court was correct in finding that petitioners' waiver was not a knowing and intelligent one.

of their right to conflict-free counsel. This largely fact-bound issue does not warrant review by this Court.[5]

Representation by an attorney unencumbered by potentially conflicting interests is an important part of the Sixth Amendment right to the effective assistance of counsel. Of course, that right, like other constitutional rights, may be waived (*Glasser* v. *United States*, 315 U.S. 60, 70-71 (1942); *United States* v. *Alvarez*, 580 F. 2d 1251, 1259 (5th Cir. 1978); *United States* v. *Dolan*, 570 F. 2d 1177, 1181 (3d Cir. 1978); see *Holloway* v. *Arkansas*, 435 U.S. 475, 483 n.5 (1978)), although, as we discuss in note 4, *supra*, we do not believe a court is obliged to accept such a waiver. To be acceptable, however, the waiver must be made knowingly, intelligently, and with a full awareness of its likely consequences. *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938). Moreover, for the trial court to find that a waiver is knowing and intelligent, it

[5]The court of appeals did not address the question of its jurisdiction to entertain petitioners' pretrial appeal of the order disqualifying their attorney from representing both petitioners at trial. Although there is authority for the proposition that an order disqualifying counsel in a criminal trial is appealable under 28 U.S.C. 1291 (see *In re Benjamin*, 582 F. 2d 121, 124 (1st Cir. 1978) (dictum); *United States* v. *Garcia*, 517 F. 2d 272, 275 (5th Cir. 1975)), and that disqualification orders in civil cases are likewise appealable (see, *e.g.*, *Board of Education* v. *Nyquist*, 590 F. 2d 1241, 1247 n.8 (2d Cir. 1979); *Aetna Casualty & Surety Co.* v. *United States*, 570 F. 2d 1197 (4th Cir.), cert. denied, 439 U.S. 821 (1978); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F. 2d 602 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978)), this Court has not decided whether such orders would be effectively unreviewable on appeal from a final judgment of conviction and therefore within the collateral order exception to the final judgment rule under 28 U.S.C. 1291. Compare *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978), with *Abney* v. *United States*, 431 U.S. 651 (1977). There is no need to address that question here, however, because the court of appeals properly rejected petitioners' claim on the merits.

"must be satisfied that the defendant is aware of the foreseeable prejudices his attorney's continued representation could entail for his trial, and possible detrimental consequences of those prejudices." *United States* v. *Dolan*, *supra*, 570 F. 2d at 1181. See also *United States* v. *Carrigan*, 543 F. 2d 1053, 1055 (2d Cir. 1976); *United States* v. *Gaines*, 529 F. 2d 1038, 1043-1044 (7th Cir. 1976); *United States* v. *Garcia*, 517 F. 2d 272, 278 (5th Cir. 1975). Such a determination, in turn, depends upon the particular facts and circumstances of each case, including the background, experience and conduct of the accused. *Glasser* v. *United States*, *supra*, 315 U.S. at 70-71; *Johnson* v. *Zerbst*, *supra*, 304 U.S. at 464-465.

Here, upon being informed by the government of the potential conflict of interest, the district court conducted an exhaustive inquiry into the matter.[6] That inquiry revealed a substantial possibility that an actual conflict of interest might develop in connection with a guilty plea or at trial. Indeed, defense counsel admitted to the district court that the indictment, as drawn, was "pregnant with potential conflict" because of the allegation that Quinones

[6]Petitioners are correct in pointing out (Pet. 10-11) that the courts of appeals differ regarding the duty of the trial court to make inquiry of jointly represented defendants concerning conflicts of interest. This disagreement among the circuits is not relevant here, however, as petitioners do not contest the propriety of the district court's decision to hold a hearing on the possibility of conflict. We also note that any disagreement among the circuits may be resolved by Rule 44(c) of the proposed amendments to the Federal Rules of Criminal Procedure. That proposed rule states, in pertinent part, that in cases of joint or multiple representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."

had supervised Figueroa's activities.[7] Thus, although defense counsel assured the court that petitioners' planned defenses did not conflict, the court, under these circumstances, had a special duty to assure that any waiver made by petitioners was knowing and intelligent. See, *e.g.*, *United States* v. *Bernstein*, 533 F. 2d 775, 788 (2d Cir. 1976).

Despite petitioners' repeated assertions that they recognized the possibility that a conflict might arise at trial which would force their attorney to sacrifice the interests of one of them in order to protect the other, petitioners' replies to many of the court's questions quite plainly showed that in fact they did not fully appreciate the gravity of the problem or the import of their attempted waiver. See notes 2 and 3, *supra*. Nor did the district court feel that, given the admitted potential for conflict apparent from the face of the indictment, it was in a position accurately to determine the likelihood that such a conflict would occur. Moreover, as the district court stated (1 H. 38), petitioners' difficulty with the English language was "an enormous additional problem which [it] can't just ignore." Based on these circumstances, the district court stated that it was unable to conclude that

[7]Further, in a portion of the transcript of the second day's proceedings not reprinted in the appendix to the petition for a writ of certiorari, counsel informed the court that petitioners could not afford separate counsel, that they developed confidence in him "knowing full well [he] might have to compromise those interests" if the hypothetical situations the court described should arise, and that he agreed that he was put "in a difficult position" (2 H. 25-26).

petitioners had made a knowing and intelligent waiver of their right to conflict-free counsel.[8]

The district court, which alone personally observed petitioners, their interaction with each other and with attorney Burr, and their immediate understanding (or lack of understanding) of the subtle difficulties joint representation might have created, was uniquely well situated to rule on the question. The difficulties of joint representation may go unappreciated even by sophisticated defendants, because of what they "tend[] to *prevent* the attorney from doing." *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 489-490 (emphasis added). These problems—such as the failure to explore plea negotiations for one client that may come at the expense of the other, or failure to challenge the admission of evidence favorable to one but damaging to the other—would be all the more difficult to detect, much less anticipate, by petitioners in this case, who were only marginally able to use the English language. The court of appeals was thus correct in endorsing the district court's factual determination, and there is no reason for further review.

[8]Petitioners claim (Pet. 12-14) that the district court failed to articulate its reasons, or make adequate findings, to support its refusal to accept petitioners' waiver. This contention is without merit. Although the district court, in its September 6, 1979 order requiring Burr to withdraw from the representation of one of the petitioners, did not state its reasons for concluding that petitioners had not made a knowing and intelligent waiver of their right to the effective assistance of counsel, the court clearly stated that its conclusion was based on the findings it made during the September 4 and 5 hearings. As outlined above (see pages 3-5, *supra*), these findings were ample to support the district court's ruling on this issue.

Finally, petitioners' contention to the contrary notwithstanding (Pet. 13), the district court's disposition does not amount to a ruling that defendants may never waive conflict-free representation (but see note 4, *supra*). As the court below noted (Pet. App. A29-A30, quoting *United States* v. *Dolan*, *supra*, 570 F. 2d at 1181):

> "Implicit in [an inquiry procedure looking towards the competence of such a waiver] is the possibility that a trial judge may not be satisfied that the waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

In the circumstances of this case, as the court of appeals concluded, the district court's finding on this issue was not clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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